IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1108 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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PRATAPBHAI RAIMALBHAI BAROT

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 1108 of 1999
MR AM PAREKH for Petitioner No. 1
MR HN JHALA for Petitioner No. 1
MR HH PATEL,APP for Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 24/04/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

1. Pratapbhai Raimalbhai Barot, the original accused no.2 of Special Case No. 74 of 1998 has filed this appeal challenging the judgment and order dated 12.10.1999 passed by learned Addl. Sessions Judge, Banaskantha at Palanpur. By the said judgment, the learned judge convicted both the accused for offences punishable under sections 17 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and sentenced them to suffer R.I. for ten years and to pay a fine of Rs. 1 lac, in default, to undergo S.I. for two years in each of the offences, with a further direction to run both the sentences concurrently. It may be stated that as the original accused no.1 namely Bhagabhai Bhikhabhai Rabari has remained absconded, he could not be served with non bailable warrant issued against him and, therefore, the learned judge passed judgment and order of conviction and sentence in absence of the said accused no.1. The said accused no.1 has not challenged the said judgment by filing any appeal.

2. Mukeshkumar Vyas, PSI, Suigam Police Station is the complainant in the present case. He has been examined as PW 9 Ex. 29. He has deposed that on 24.6.1998, while performing combing duty at night hours, along with the staff of police station, at about 5.00 a.m., he saw scooter coming out from the direction of Vav town. By blowing whistle and raising hand, he tried to stop the said vehicle. However, the driver of the scooter did not stop the scooter and ultimately the driver halted the scooter after some distance. The pillion rider of the scooter fled away. The raiding party, however, caught hold of the driver of the scooter. On being inquired about the name, the driver informed his name to be Bhagabhai Bhikhabhai Rabari. He also gave the name of the pillion rider as Pratapbhai Raimalbhai. On making search of the person of the driver of the scooter, nothing was found. The complainant thereafter made arrangement to call panchas. On being asked to open the dicky, Bhagabhai did not oblige the complainant. However, in presence of panchas, dicky was opened and a plastic bag was recovered from the dicky. Again, the appellant was asked whether he would like to be searched in presence of a gazetted officer to which he said 'No'. A black substance was recovered from the plastic bag with the help of lights of police van. The plastic bag was opened, substance of black liquid was found out from the plastic bag. On smelling the same, it smelt like opium. After calling the goldsmith, it was weighed and found to be 1 kg.950 gms. Thereafter procedure of seizing,

sampling and sealing was carried out in presence of panchas under panchanama Ex. 9. PSO Suigam Police Station registered complaint. The complainant himself took over the investigation. He thereafter arrested A/1, recorded statements of other witnesses and sent muddamal to FSL for analysis. On getting the report Ex. 50 from FSL confirming the substance to be opium, chargesheet was filed against both the accused. It may be stated that the A/2 was arrested on 23.8.1998.

3. The charge Ex. 4 was framed against both the accused by the learned 2nd Extra Assistant Judge, Banaskantha at Palanpur. The accused pleaded not guilty to the charge and claimed to be tried.

4. As observed earlier, after appreciating the evidence on record and further statement of the accused recorded under section 313 of the Code of Criminal Procedure, the learned judge passed the impugned judgment and order of conviction and sentence against both the accused.

5. As stated above, the appellant is convicted for offences punishable under sections 17 and 29 of the Act. Section 17 prescribes punishment for contravention in relation to prepared opium. As per FSL report, it is not in dispute that the substance recovered from the dicky of the scooter was opium. Section 29 of the Act prescribes punishment for abetment and criminal conspiracy. The only question required to be decided by us in this appeal is as to whether the appellant can be convicted for possessing, selling, purchasing or transporting prepared opium which attracts provisions of section 17 while abetting or is a party in the conspiracy with accused no.1 and has committed offence attracting provisions of section 29 of the Act. As per the say of the complainant Mr.Vyas, when the scooter was stopped, the person sitting behind the driver had escaped. On being inquired about the name of that person from A/1, the A/1 had given the name of the appellant as Pratapbhai Raimalbhai.Because of darkness, the members of the raiding party could not identify the appellant. Thus, except the statement of A/1, there is no evidence worth the name on record which may involve the appellant in the incident. True, A/1, when gave the name of the appellant, was not arrested at that time and,therefore, the statement giving name of the appellant to the police officer is admissible in evidence. However, except giving name of the appellant, no other details regarding their joint venture of possessing, selling, transporting narcotic substance is disclosed. Admittedly, it is not in dispute that the A/1

is the owner of the scooter in question and was driving the same. It is also not in dispute that the appellant was a pillion rider on the said scooter. No material worth the name is produced in the instant case regarding the knowledge on the part of appellant that dicky contained contraband substance. In other words, prosecution has not established conscious possession of the contraband substance of the appellant. Similarly, appellant abetted or hatched criminal conspiracy of possessing, selling or transporting the contraband substance with A/1 is also not established beyond reasonable doubt.

The learned trial judge has given too much importance to the fact that the appellant escaped no sooner the accused were apprehended and, therefore, inference was drawn against appellant regarding his involvement. Likewise, the learned judge was impressed with the fact that it was a one transaction and the name of appellant was disclosed by A/1 and the narcotic substance was recovered from the dicky of the scooter and, therefore, the prosecution has established the involvement of the appellant along with A/1.

6. We have carefully examined the reasonings given by the learned judge. Frankly speaking,the reasonings of the learned judge have not impressed us. In our opinion, the learned judge has unnecessarily connected the act of running away of the appellant no sooner he saw the police and recovery of contraband substance subsequently. A/1 has nowhere disclosed the fact that he and the appellant were transporting contraband substance kept in the dicky of the scooter, as a part of their conspiracy. No material worth the name is produced regarding appellant having previous knowledge of the fact that dicky contained contraband substance. A/1 is neither asked about the involvement of appellant in the offence nor has he involved appellant. Running away from the spot after having apprehended may be a circumstance to be used against the appellant, but cannot conclusively establish guilt. The learned trial judge, in our opinion, has not considered the matter from this angle.

Since we are concerned in this appeal about the part played by the appellant, we have not considered the legal questions regarding compliance of mandatory provisions of Act etc.

Thus, taking into consideration the circumstances and overall view of the matter, the prosecution in the instant case has failed to establish charge under section 17 and 29 of the Act against the appellant and, therefore, the learned judge was not justified in

convicting the appellant for the said offences.

7. In the result, the appeal is allowed. We set aside the judgment and order passed by learned Addl. Sessions Judge, Banaskantha at Palanpur dated 12.10.1999 in Special Case No. 74 of 1998 qua accused no.2 Pratapbhai Raimalbhai Barot, convicting him for offences punishable under sections 17 and 29 of the Act. The appellant-original accused no.2 Pratapbhai Raimalbhai Barot is ordered to be set at liberty forthwith if not required in any other case.

(Kshitij R.Vyas, J.)

(Ravi R.Tripathi,J.)

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